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NO. 82-165

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

STATE OF WASHINGTON, ex rel.
SHANA MARIE GOODNER, a minor,
by her Guardian ad Litem,
REED HADLEY, and
DIANA LYNN GOODNER,

Respondents,

v.

CHARLES WILLARD SPEED,

Petitioner.

On Certiorari from the Supreme Court

of the State of Washington

BRIEF IN OPPOSITION TO

PETITION FOR CERTIORARI

HENRY R. DUNN
Prosecuting Attorney
Hall of Justice
312 S. First Avenue W.
Kelso, WA 98626
Telephone: 206/577-3080

Attorney for Respondent

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STATEMENT OF THE CASE

In February 1978 the Cowlitz County Prosecuting Attorney filed a complaint under the Uniform Parentage Act, Wash. Rev. Code 26.26, alleging that Petitioner was the father of Shana Marie Goodner, a child born out of wedlock to Diana Lynn Goodner on August 12, 1973.

Petitioner, who has been represented by counsel throughout this proceeding, denied paternity and the matter was set for trial. Petitioner's request for a jury trial was denied on the basis of Wash. Rev. Code 26.26.120(5): "The trial shall be by the court without a jury."

At trial, Petitioner admitted dating Ms. Goodner from November 1972 through January 1973, and admitted becoming engaged to Ms. Goodner, though the engagement lasted only a few weeks. Ms. Goodner testified that she and Petitioner had sexual intercourse regularly during the course of their relationship; Petitioner denied ever having had sexual intercourse with Ms. Goodner. Results of a blood test conducted by the Baltimore RH Typing Laboratory were admitted into evidence. The results showed that the plausibility of

Petitioner being Shana Marie Goodner's father was 99.47%, meaning that it is 187 times more likely that Petitioner is Shana Goodner's father than is a man selected at random.

The trial court found that Petitioner was Shana Goodner's father, and ordered him to pay child support of $62.50 per month through 1980 and $100 per month thereafter.

Petitioner appealed first to the Washington Court of Appeals and then to the Washington Supreme Court, claiming that the statutory provision denying jury trials abridged the state constitution. Both appellate courts unanimously rejected petitioner's claim. State ex rel. Goodner v. Speed, 26 Wash. App. 648, 613 P.2d 1207 (1980), aff'd, 96 Wash. 2d 838, 640 P.2d 13 (1982).

SUMMARY OF ARGUMENT

1. The Court lacks jurisdiction to grant certiorari. Petitioner's claim is that Wash. Rev. Code 26.26.120(5) violates the state constitution; his argument concerning the 1881 Washington territorial statute goes only to the historical question of the extent

of the right to trial by jury at the time of Washington's statehood in 1889. A territorial statute is not an "act of Congress" or a "law of the United States," and this case is not within the Court's jurisdiction under 28 U.S.C. §1257(3).

2. The Washington Supreme Court does have the power of judicial review over territorial statutes. The Enabling Act allowing Washington to enter the Union constitutes the state supreme court as a successor to the territorial supreme court. The territorial court had the power to review territorial statutes, and as its successor the state supreme court too has that power.

3. It is uncontested that the 1881 territorial statute was enacted in violation of the federal Organic Act creating the Territory of Washington. The supremacy clause thus required the state supreme court to uphold the federal statute and invalidate the territorial statute.

4. No "substantial and important reasons" exist for granting certiorari. Any federal issue in this case is remote at best. The result reached by the Washington Supreme Court is consistent with decisions of other

courts. And the question the Petition presents - the power of state courts to review territorial statutes - is largely of historical rather than current interest.

ARGUMENT

A. THIS COURT LACKS JURISDICTION TO GRANT CERTIORARI.

The Petition for Certiorari asserts, without elaboration, that the Court has jurisdiction in this case pursuant to 28 U.S.C. §1257(3). In pertinent part, that statute provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.
>
> . . . .

From the outset of this proceeding Petitioner's claim has been that the Washington statute requiring bench trials in paternity actions violates article 1, section 21 of the Washington state constitution, which provides that "[t]he right of trial by jury shall remain inviolate . . . ." In other words, Petitioner urges this Court to declare a state statute to be in violation of a state constitution. Respondents respectfully submit that this Court has no jurisdiction to grant certiorari in these circumstances.

1. **Petitioner's Claim Involves No Laws of the United States.**

Petitioner's argument is as follows: In 1881 the territorial legislature adopted a civil bastardy statute under which an alleged father had a right to a jury trial, 1881 Wash. Terr. Code §§1212-1221; that statute was still "on the books" at Washington's statehood in 1889; therefore the "right of trial by jury" which under the state's constitution must "remain inviolate" extends to actions under the Uniform Parentage Act.

Any tinge of federal color to this claim can come only from that 1881 territorial statute. And though

Petitioner variously suggests that the territorial act was an "act of Congress" and Congress' "own act," Petition for Certiorari at 2, 14, 22, 25, 27, in fact it was neither, as citation to just a few authorities will demonstrate.

In Miners' Bank of Dubuque v. Iowa, 53 U.S. (12 How.) 1, 13 L.Ed. 867 (1852), the Wisconsin territorial legislature had passed a statute granting a bank charter. Congress later created the Territory of Iowa out of a portion of the Wisconsin territory. The new Iowa territorial legislature then passed an act repealing the bank charter (the bank being located in Iowa). After the Iowa Supreme Court entered a judgment of ouster against the bank, the bank tried to appeal to this Court. As the basis for the Court's jurisdiction, the bank argued that its charter, granted by the territorial statute with the express approval of Congress, "should be regarded as an Act of Congress," such that the Iowa court's decision would have drawn in question a United States statute, thus allowing review by this Court under the predecessor to 28 U.S.C. §1257. The Court, however, rejected the bank's contention, declared that the bank's charter was merely

"the creature of that [Wisconsin territorial] Legislature," and dismissed the appeal for lack of jurisdiction. Id. at 8-9, 13 L. Ed. at 870.

See also Clayton v. Territory of Utah, 132 U.S. 632, 638, 10 S. Ct. 190, 33 L.Ed. 455, 458 (1890), where the Court, in holding that an Organic Act passed by Congress to establish a territory took precedence over an inconsistent act of that territory's legislature, stated as its beginning premise "that in case of a conflict between the Organic Act . . . and any act of the Territorial Legislature the Act of Congress must prevail." (Emphasis added.) Obviously the Court considered that it was dealing with only one "Act of Congress."

Finally, the Organic Act creating the Territory of Washington demonstrates the distinction between acts of the territorial legislature and acts of Congress. Section 6 of that Organic Act provides that "the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." Act of March 2, 1853, 10 Stat. 172, ch. 90 §6 (emphasis

added). Plainly, territorial acts are not "acts of Congress" or "laws of the United States."[1]

2. This Case Does Not Come within 28 U.S.C. §1257(3).

Having shown that the bastardy statute enacted by the 1881 territorial legislature was not an act of Congress,[2] it can be readily seen that this case fits none of the categories of 28 U.S.C. §1257(3):

(a) Neither the Petition nor the decision of the court below "draw[s] in question" "the validity of a treaty or statute of the United States." What the Petition does draw in question is the validity of a state

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[1]Indeed, under 28 U.S.C. §1257 not even all statutes passed by Congress itself are considered to be laws of the United States. Key v. Doyle, 434 U.S. 59, 61, 98 S.Ct. 280, 281, 54 L.Ed.2d 238 (1977), holds that an act of Congress "applicable only in the District of Columbia is not a 'statute of the United States' for purposes of 28 U.S.C. §1257(1)."

[2]Petitioner's repeated characterization of the territorial bastardy act as an "act of Congress" and Congress' "own act" is so inexcusably inaccurate as to justify invoking Supreme Court Rule 21.5: "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition." (Emphasis added.)

statute; what the decision below drew in question was not the validity of a "statute of the United States," but an act of the territorial legislature.

(b) "[T]he validity of a State statute" is not "drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States." Petitioner alleges that the state statute is "repugnant to" the territorial bastardy act and to the state constitution, neither of which is a "law of the United States."

(c) Finally, because Petitioner bases his claim wholly on non-federal grounds, no "right . . . is specially set up . . . under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

"Jurisdictional statutes are to be construed 'with precision and with fidelity to the terms by which Congress has expressed its wishes.' " Palmore v. United States, 411 U.S. 389, 396, 93 S. Ct. 1670, 1675, 36 L.Ed.2d 342 (1973), quoting Cheng Fan Kwok v. INS, 392 U.S. 206, 212, 88 S. Ct. 1970, 1974, 20 L.Ed.2d 1037

(1968). No matter how Petitioner tries to dress up this case in federal clothing, it fits "with precision" none of the situations in which 28 U.S.C. §1257(3) allows the Court to grant certiorari. Petitioner's claim is fundamentally a claim that the Washington state statute violates the Washington state constitution. And Miller v. Cornwall Railroad Co., 168 U.S. 131, 134, 18 S. Ct. 34, 42 L.Ed. 409, 411 (1897), provides the answer to litigants seeking to have such claims heard by this Court: "We have no jurisdiction on a writ of error to a state court to declare a state law void on account of its collision with a state Constitution . . . ."

For the above reasons, Respondents respectfully assert that the Court lacks jurisdiction and that the Petition should be denied on that basis.

B. THIS CASE DOES NOT WARRANT THE COURT'S REVIEW BY CERTIORARI.

Setting aside the jurisdictional question, there is still nothing about this case to warrant the Court's discretionary review.

1. The Question Presented Was Correctly Decided by the Washington Courts.

Petitioner recognizes that the 1881 territorial bastardy act on which he bases his claim was held invalid by the Washington Supreme Court in 1903. State v. Tieman, 32 Wash. 294, 73 P. 375 (1903). The territorial legislature, in passing that statute, violated the following provision of the Organic Act:

> To avoid improper influences, which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title.

Act of March 2, 1853, 10 Stat. 172, ch. 90 §6. Thus the Tieman court held that the territorial law "is not, and never was, a valid enactment." 32 Wash. at 298, 73 P. at 376. Petitioner has never contended that the territorial bastardy act was properly enacted. Rather, he contends that it is the Tieman decision that is the nullity, in that the Washington Supreme Court lacked the power to invalidate the territorial act. This argument has no merit, for the following reasons.

(a) The Washington Supreme Court is a successor to the Territorial Court. In 1889 Congress passed the

Enabling Act setting forth the terms upon which the Territory of Washington could be admitted into the Union. Act of February 22, 1889, 26 Stat. 676, ch. 180. It provided for the smooth transition from the territorial judicial system to the dual system of federal and state courts that would take effect with statehood. The Enabling Act created federal circuit and district courts, id. §21, provided for transferring cases from the territorial courts to the federal and state courts, id. §23, and declared that

> each of the circuit, district, and State courts, herein named, shall, respectively, be the successor of the supreme court of the Territory, as to all such cases arising within the limits embraced within the jurisdiction of such courts respectively with full power to proceed with the same . . . .

Id. §22.

Tieman, being a proceeding to determine paternity and fix a support obligation, was not cognizable in the federal courts, but could be commenced only in a state court. The appeal route too, of course, was to a state court - the Washington Supreme Court. To function as the state's highest court the Washington Supreme Court had to be able to review

the validity of the statute upon which the action against Tieman was based. As the court below said,

> [s]ince Congress intended that the state courts take over certain of the litigation pending in the territorial courts, it follows that as successor courts to the territorial courts the state courts would necessarily be required to construe territorial legislation in the course of deciding such cases.

State ex rel. Goodner v. Speed, 96 Wash. 2d 838, 844, 640 P.2d 13, 16 (1982).

Constituted by federal statute as the successor to the territorial supreme court, the Washington Supreme Court did have the authority to hear, and sustain, Tieman's challenge to the validity of the territorial bastardy statute.

(b) The supremacy clause requires the result reached in Tieman. The Tieman court had before it two statutes - the Organic Act passed by Congress in 1853 and the bastardy statute enacted by the territorial legislature. Petitioner concedes that the manner in which the latter was enacted violated the Organic Act.

The supremacy clause, U.S. Const. art. VI, compelled the result reached in Tieman. Even accepting Petitioner's claim that the territorial act was

somehow federal in character, that act clearly was of lesser rank than the Organic Act. And the premise stated by this Court in Clayton v. Territory of Utah, 132 U.S. 632, 638, 10 S. Ct. 190, 33 L.Ed. 455, 458 (1890), discussed above, leaves no doubt as to the result the Tieman court had to reach: "in case of a conflict between the Organic Act creating the Territory . . . and any Act of the Territorial Legislature, the Act of Congress must prevail."[3]

It is curious that Petitioner cites the supremacy clause as a bar to the state court's decision to abide by the Organic Act as against the territorial statute. His argument - that because of the "federal" character of the territorial act the supremacy clause immunized it from challenge in a state court - produces absurd results. If territorial laws are beyond the pale of state judicial power, they are equally outside state legislative power, for the state legislature has no authority to

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[3]See also Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78, 2 L.Ed. 60, 73-74 (1803) ("If two laws conflict with each other, the courts must decide on the operation of each . . . . This is of the very essence of judicial duty.").

overturn an "act of Congress." Petitioner's theory thus means that the territorial statutes Washington inherited at statehood in 1889 must still be in effect today, that the Washington legislature has no power to amend or repeal them, and that only by federal legislation may those nineteenth century laws be altered.

Far from prohibiting the result reached in Tieman, the supremacy clause compelled it.[4]

2. The Case Presents No "Substantial and Important Reasons" Justifying Discretionary Review.

Under Supreme Court Rule 17.1 writs of certiorari are limited to cases presenting "substantial and important reasons" for review. This case presents no such reasons.

First, even if the question of the Tieman court's power to invalidate the territorial act is deemed a

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[4]The duty imposed on state courts by the supremacy clause requires them to disregard even United States statutes, when those statutes contravene the U. S. Constitution. This is implicit in 28 U.S.C. §1257(1), which grants a right to appeal to this Court from a state court's decision "where is drawn in question the validity of a . . . statute of the United States and the decision is against its validity." (Emphasis added.) Cf. Flournoy v. Wiener, 321 U.S. 253, 64 S. Ct. 548, 88 L. Ed. 708 (1944).

federal question, resolution of that issue is of secondary rather than primary importance to whether Petitioner is entitled to a jury trial. For a decision on the merits by this Court will only serve to clarify an issue of state law - whether the "right of trial by jury" protected by the Washington state constitution extends to paternity actions. The remoteness of any federal issue counsels against an exercise of this Court's discretionary authority.

Second, viewing the case on a national scale, the issue it presents has not divided the nation's courts, nor does it have any enduring significance.

As the court below noted, Petitioner's argument that a state court lacks the power of judicial review over territorial statutes is made "without apposite supporting authority." 96 Wash. 2d at 844, 640 P.2d at 16. Indeed, other state courts have dealt with the issue the same way the Washington Supreme Court did in both Tieman and this case. In State ex rel. Bliss v. Greenwood, 63 N.M. 156, 315 P.2d 223 (1957), the New Mexico Supreme Court declared invalid a territorial statute that contravened the separation of powers. And

in Bailey v. Fairbanks Independent School District, 370 P.2d 526 (Ak. 1962), the Alaska Supreme Court reviewed a territorial act against a claim that it violated the federal Constitution. The court sustained the act, but that it entertained the challenge at all demonstrates its power to review territorial statutes.

The absence of any enduring significance in the question the Petition presents is readily apparent. Territorial statutes have little relationship to the body of law applicable in today's society. The authority of state courts to review territorial statutes is an issue that may have had some importance at time in our history when territories were being regularly admitted into the Union. This last occurred 22 years ago, however, and in this century only five territories have become states. Indeed, Petitioner's argument goes not so much to the Washington Supreme Court's decision in this case as to its 1903 decision in Tieman.

At best, the Petition raises an issue of historical or academic interest; such issues are inappropriate for review by certiorari. Rice v. Sioux City Memorial Park

Cemetery, Inc., 349 U.S. 70, 74, 75 S. Ct. 614, 99 L. Ed. 897, 901 (1955).

CONCLUSION

Respondents respectfully request that the Petition for Certiorari be denied.

DATED this 17th day of August, 1982.

Henry R. Dunn

HENRY R. DUNN
Cowlitz County
Prosecuting Attorney
Attorney for Respondents